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No.

Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES PLUMMER, SHERIFF
OF ALAMEDA COUNTY,

Petitioner,

v.

JAMES PETTAWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the collateral estoppel component of the Double Jeopardy Clause, hitherto limited to successive criminal prosecutions brought by the State, should be expanded to retrials sought by the defendant?

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v.

JAMES PETTAWAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed August 23, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 943 F.2d 1041 (1991) (App. A, *infra*, 1-19). The District Court's order denying

the petition for writ of habeas corpus was unreported (App. B, *infra*, 20-28). The December 29, 1988, opinion of the California Court of Appeal is reported at 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988) (App. C, *infra*, 29-94). The May 16, 1985, opinion of the California Court of Appeal was unreported (App. D, *infra*, 95-106).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 23, 1991. Rehearing and rehearing en banc were denied on March 24, 1992 (App. E, *infra*, 107). This petition for writ of certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT

A. Factual Background

On March 1, 1981, respondent visited Karen Taylor at her home in Oakland, California. Taylor left to pick up Michael Seals at the bus stop, leaving respondent behind. While Taylor was gone, respondent's girlfriend, Lawana

Walker, came by. On her return, Taylor joined respondent and Walker at the dining room table, while Seals stood near a heater between the dining and living rooms. Respondent offered the women cocaine. Taylor declined; Seals watched as respondent and Walker snorted cocaine.

Seals heard respondent say to Walker, "Give me the thing." Walker took a handgun from her purse and handed it to respondent, who then walked past Seals into the living room. Respondent turned toward Seals, who had his back to him, and shot Seals in the back of the neck. As Seals fell to the floor, he saw Taylor run into the kitchen. Seals then fainted.

Seals regained consciousness in time to see respondent and Walker leave the house together. The police later discovered Taylor's body in the bathtub. She had been shot twice while kneeling in the bathtub facing her assailant.

Respondent fled the state. He was arrested some months later in Texas, after he ran a red light. He gave a false name when arrested, but subsequently gave his true name. A search of his motel room revealed seven bullets matching those found in Taylor's body.

Respondent's former employer testified that he kept a gun and bullets in his office, that the gun was missing on the morning of March 1, 1981, that the gun was later returned, but that some ammunition was missing. Ballistic evidence showed that the gun was used to shoot Taylor. The bullet in Seals' neck was never removed.

Respondent admitted that he and Walker were at Taylor's house. He stated that they had been up all night drinking and snorting cocaine with Taylor and another

man. In the morning, while respondent and Walker were briefly absent, a second man arrived. After respondent and Walker returned to Taylor's home, Taylor left to pick up Seals. Taylor asked respondent to keep an eye on the two men. When Taylor returned, the two men were in the back of the house, using cocaine.

Taylor asked to borrow respondent's gun for protection. Respondent took the gun from Walker and placed it on the dining room table, after which he sat on the sofa and closed his eyes. Respondent suddenly heard a gunshot, and saw Seals fall to the floor. When respondent heard a man ask, "Where is the other one at," he fled. He later saw Walker and the two men leave the house together.

Walker convinced respondent not to surrender. Walker initially told respondent that she shot Taylor; later Walker said that one of the other men shot Taylor because she had not paid him for some cocaine. Respondent fled the state. At trial, he declined to identify the two men in Taylor's house.

Neither party requested and the trial court initially did not give instructions on aiding and abetting. On the third day of deliberations, the jury requested instructions on the law of complicity, asking specifically whether respondent could be convicted of murder or attempted murder without having personally fired the gun. In response, the trial court instructed the jury on liability under an aiding and abetting theory.

The jury convicted respondent of first degree murder, Cal. Penal Code § 187, and attempted murder. Cal. Penal Code §§ 664/187. As to the attempted murder charge, the jury found true special enhancement

allegations that respondent personally used a handgun and personally inflicted great bodily injury during the commission of the offense. Cal. Penal Code §§ 12022.5, 12022.7. The jury did not find true the identical special enhancements alleged as to the murder charge.

B. Procedural History

On May 16, 1985, the California Court of Appeal in an unpublished opinion affirmed the attempted murder conviction, but reversed the murder conviction due to instructional error. App. D. at 103, 106. On remand, respondent moved to preclude the prosecution from proceeding on retrial on the theory that he shot the victim, and from referring to him as the actual killer, contending that the not true findings on the special enhancement allegations collaterally estopped the prosecution from presenting evidence or argument on that issue.

The trial court granted respondent's motion, ruling that the prosecution could not present the case to the jury on a theory other than aiding and abetting. The trial court ruled irrelevant and inadmissible any evidence that petitioner was the actual killer or personally used a gun. Because the prosecution represented that the evidence supported only a finding that petitioner was the actual killer, the trial court dismissed the murder charge.

The People appealed, and on December 29, 1988, the California Court of Appeal in a published opinion reversed the dismissal. App. C at 63. The court held "that where a defendant has been convicted of first degree murder at his first trial and that conviction is reversed on

appeal because of instructional error, the defendant may be retried as the murder perpetrator despite negative jury findings, at the first trial, on the personal use of a handgun and personal infliction of great bodily injury enhancement allegations." *Id.* at 34. The court rejected the application of collateral estoppel principles to the sentence enhancement findings, and suggested, in addition, that the jury's findings on the enhancement allegations were inconsistent with its finding of guilt on the murder charge. *Id.* at 46-47, 50. On April 20, 1989, the California Supreme Court denied review.

On January 2, 1990, the District Court for the Northern District of California denied respondent's petition for writ of habeas corpus. The district court found that the jury, when returning not true findings on the sentence enhancement allegations, did not determine necessarily that respondent was not the direct perpetrator of the murder because such determination was unnecessary to its finding that respondent was guilty of murder. App. B at 27. The court concluded that the sentence enhancement findings should not collaterally estop the prosecution from retrying respondent on the theory that he personally shot the victim. *Ibid.*

In a published opinion filed on August 23, 1991, the Ninth Circuit Court of Appeals reversed the district court's order and directed that court to issue the writ of habeas corpus. The court found that "the fact that the personal use determination at issue in the present case was not formally necessary for a finding of guilt on the murder charge does not prevent the finding from having collateral estoppel effect in this case." App. A at 8. The court also found that the issue was "necessarily determined" for

purposes of collateral estoppel, and that the sentence enhancement findings were not inconsistent with the jury's finding that respondent was guilty of murder. *Id.* at 12-13. The court reviewed this Court's recent decision in *Grady* v. *Corbin*, 495 U.S. 508 (1990) and concluded that "[t]he present case presents essentially the same situation." App. A at 16. Applying the principles announced in *Grady*, the court held that the state trial court had correctly barred retrial on a theory that respondent was the actual perpetrator. *Id.* at 17. Because the prosecution stated that it could not retry respondent solely on an aiding and abetting theory, the court held that respondent's retrial could not proceed at all, and directed issuance of the writ. *Id.* at 19.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has ordered a murder charge against respondent dismissed on double jeopardy grounds even though the first trial resulted in a jury *conviction* of that murder. This Court has mandated that a double jeopardy inquiry "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), quoting *Sealfon* v. *United States*, 332 U.S. 575, 579 (1948). By transforming a conviction into an acquittal, the Ninth Circuit has violated this mandate, and misapplied this Court's double jeopardy jurisprudence. The Ninth Circuit has created an exclusionary rule barring relevant evidence on retrial. That rule flies in the face of this Court's century-old ruling that a defendant, once convicted, is subject to retrial following successful appeal of his

conviction. *United States* v. *Ball*, 163 U.S. 662, 671-672 (1896).

The question presented in this case is simple: When a trial results in verdicts of both acquittal and guilt, what is the collateral estoppel effect, if any, of the acquitted counts upon retrial of the counts resulting in conviction? Applying this Court's double jeopardy precedents, the answer must be none. Upon retrial, the prosecution must be allowed to present all relevant evidence tending to show the defendant's culpability in the crime of which he has already been convicted, regardless whether some or all of that evidence underlies a count or charge of which the defendant was acquitted.

A. The Ninth Circuit's Rationale Is Directly Contrary To This Court's Precedents

This Court long has held "that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart* v. *Nelson*, 488 U.S. 33, 38 (1988). See *Montana* v. *Hall*, 481 U.S. 400, 402 (1987).[1/] This well-established

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1. Two exceptions apply to the general rule permitting retrial of a defendant: (1) when a jury convicts a defendant of a lesser offense, thereby impliedly acquitting him of the greater offense charged, *Green* v. *United States*, 355 U.S. 184, 190-191 (1957); and (2) when a reviewing court reverses the conviction for insufficient evidence. *Burks* v. *United States*, 437 U.S. 1, 18 (1978). Neither exception applies here.

rule protects both the societal interest in punishing a defendant whose guilt is clear, and the defendant's interest in ensuring that the reviewing court zealously protects his right to a fair trial. *Lockhart* v. *Nelson*, 488 U.S. at 38-39; *United States* v. *Tateo*, 377 U.S. 463, 466 (1964).

Requiring "a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, 437 U.S. 82, 91 (1978). See *Lockhart* v. *Nelson*, 488 U.S. at 42; *Tibbs* v. *Florida*, 457 U.S. 31, 40 (1982); *North Carolina* v. *Pearce*, 395 U.S. 711, 721 (1969). Where the state prosecutes all charges in one proceeding, and the defendant succeeds in getting his conviction reversed on appeal, a retrial simply places the parties in the same position that they would have been in had the trial court properly conducted the proceeding in the first instance. See *Lockhart* v. *Nelson*, 488 U.S. at 40-42.

In the present case, the prosecution sought to *retry* respondent for first degree murder, a crime of which he had previously been convicted. In its opinion barring the prosecution's efforts, the Ninth Circuit created an exclusionary rule, purportedly based on double jeopardy/collateral estoppel grounds, that precluded the prosecution, in this and all similar cases, from presenting relevant evidence on the charge to be retried. This exclusionary rule potentially affects *every* case in which a jury returns verdicts of acquittal and guilt, after which the defendant successfully challenges the convictions. The rule, however, has no basis in law or logic.

In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court first recognized the doctrine of collateral estoppel as a component of the Double Jeopardy Clause. *Dowling* v. *United States*, 493 U.S. 342, 347 (1990). The doctrine provides that "'when an issue of ultimate fact has once been determined by a valid and *final judgment*, that issue cannot again be litigated between the same parties in any *future* lawsuit.'" *Id.* at 347 (emphasis added). By its own terms, collateral estoppel has no application to a retrial after reversal. There has been no "final judgment," and the second trial is not a "future lawsuit," but a continuation of the same prosecution. Plainly, nothing is "collateral" about either trial.

This Court has never extended collateral estoppel protection beyond the successive prosecution circumstances of *Ashe*. In fact, the Court stated in *Ohio* v. *Johnson*, 467 U.S. 493, 500, n.9 (1984), that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." By contrast, *Ashe* and earlier cases that applied collateral estoppel principles all involved successive trials, as opposed to retrials. See *Yates* v. *United States*, 354 U.S. 298, 335 (1957); *Sealfon* v. *United States*, 332 U.S. 575, 576-577 (1948); *United States* v. *Oppenheimer*, 242 U.S. 85, 86-87 (1916).

The distinction, which the Ninth Circuit's rationale erases, is fundamental. Like the well-established rule that double jeopardy principles do not bar retrial, *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 308-309 (1984), *Price* v. *Georgia*, 398 U.S. 323, 326, 329 (1970), see *Richardson* v. *United States*, 468 U.S. 317, 324-325 (1984),

the collateral estoppel component of the Double Jeopardy Clause also does not bar retrial following a defendant's successful appeal. This conclusion follows from the identical purpose behind double jeopardy and collateral estoppel in this context -- to protect a defendant against seriatim prosecutions initiated by the state, causing a defendant the embarrassment, anxiety, and expense of having continually to defend against the same charges. See *Ohio* v. *Johnson*, 467 U.S. at 498-499; *Ashe* v. *Swenson*, 397 U.S. at 445-447. This purpose has no relevance to a retrial -- a proceeding that a defendant has affirmatively sought by means of an appeal. See *Lockhart* v. *Nelson*, 488 U.S. at 42; *Montana* v. *Hall*, 481 U.S. at 404; *United States* v. *Scott*, 437 U.S. at 91. In this respect, a retrial is critically different from a successive prosecution that results from the state's decision to initiate new litigation on a previously adjudicated offense. In the latter situation, the defendant is exposed to the very type of overreaching state conduct that the Double Jeopardy Clause was designed to prevent.

The Ninth Circuit relied on *Grady* v. *Corbin*, 495 U.S. 508 (1990), to justify its application of collateral estoppel on retrial.[2/] In *Grady*, this Court held

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2. Our argument that collateral estoppel principles have no application on retrial was fully presented for the first time in our petition for rehearing and suggestion for rehearing en banc of the Ninth Circuit's opinion. Neither party relied on *Grady* v. *Corbin*, either in briefing or at oral argument of this case. The Ninth Circuit's adoption of the *Grady* rule for purposes of applying collateral estoppel on retrial, however, brought the issue of collateral estoppel's application on retrial into sharp focus.

> "that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 495 U.S. at 510.

The Ninth Circuit's reliance on *Grady* was misplaced. *Grady*, like *Ashe*, applies only to *successive* prosecutions, not retrials. *Detrich* v. *United States*, 924 F.2d 479, 480 (2nd Cir. 1991); *United States* v. *Farmer*, 923 F.2d 1557, 1563 & n. 12 (11th Cir. 1991); see *United States* v. *Felix*, ___ U.S. ___, ___ [60 U.S.L.W. 4259, 4262] (Mar. 25, 1992); *McIntyre* v. *Trickey*, 938 F.2d 899, 902 (8th Cir. 1991).

Whatever the complexities in application of *Grady* to successive prosecutions, see, e.g., *United States* v. *Felix*, ___ U.S. at ___ [60 U.S.L.W. at 4262], its application on retrial following a defendant's conviction is intolerable. Yet under the Ninth Circuit's expansive view of *Grady*, when a count that resulted in acquittal shares common evidence with a count that resulted in conviction, retrial of the latter count may be barred. The Ninth Circuit has effectively created an exclusionary rule of relevant evidence that may prevent reprosecution of a conviction following reversal.

The Ninth Circuit's decision cannot be reconciled with the doctrine of inconsistent verdicts, which this Court reconfirmed in *United States* v. *Powell*, 469 U.S. 57 (1984). If a defendant cannot challenge a conviction with an inconsistent acquittal on appeal, it necessarily follows that

he cannot use that acquittal to forestall the very retrial which he requested. That the verdicts may not be inconsistent, as the Ninth Circuit purported to find in this case, is of no consequence. The plain teaching of *Powell* is that it is unnecessary to harmonize verdicts, provided that findings of guilt are supported by substantial evidence. The Ninth Circuit's expansive application of collateral estoppel violates this fundamental principle.

In this case, the state intended to retry respondent on the charge of first degree murder. It did not intend to charge respondent a second time with sentence enhancement allegations of personal gun use and personal infliction of great bodily injury. The Ninth Circuit's ruling prevents the state from presenting all relevant evidence on the murder charge, and has effectively awarded respondent with an acquittal on the murder charge despite the jury's verdict of guilt, and despite the undisputed sufficiency of the evidence to support that verdict.

This situation is not isolated. Defendants convicted of murder, but "acquitted" of sentence enhancement allegations, may now argue that all evidence underlying the enhancement finding, such as for gun use, is inadmissible on retrial. Prosecutors must decide whether to forego charging sentence enhancement allegations to avoid potentially undermining a retrial on the substantive offense if the defendant successfully appeals his conviction. Furthermore, *any* case with verdicts of both acquittal and guilt is subject to the same infirmity. Defendants may argue on retrial that all evidence of conduct underlying the acquitted count must be excluded, thereby preventing the prosecution from presenting sufficient evidence to

convict the defendant a second time on the counts that resulted in guilty verdicts.

The Ninth Circuit's application of collateral estoppel principles, and its adoption of the rule announced in *Grady* as the test to be applied, seriously erode the viability of the principle that the Double Jeopardy Clause does not prevent retrial. It serves society little to know that a defendant may be retried following reversal of a conviction, thus vindicating the "societal interest in punishing one whose guilt is clear," *United States* v. *Tateo*, 377 U.S. at 466, when the prosecution is prevented from introducing relevant evidence on the count to be retried. If the evidence remaining is insufficient to warrant conviction, the result will be a pretrial dismissal or post-trial acquittal, notwithstanding that the first verdict was based on evidence sufficient to convict beyond a reasonable doubt.

B. Conflict Between State and Federal Law, and Between the Federal Circuit Courts, Requires this Court's Resolution

In *People* v. *Pettaway*, 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988), the California Court of Appeal rejected the arguments later embraced by the Ninth Circuit. The state court found that collateral estoppel principles were not applicable in these circumstances. The court stated that the "negative finding on the enhancements was not essential to the judgment of conviction of first degree murder reached at the first trial, does not impose any finality on the merits and, therefore, does not collaterally estop the prosecution from retrying

the appellant as the perpetrator nor preclude the presentation of admissible evidence to prove that theory of guilt." App. at 46-47. The state court explicitly relied on this Court's rule of continuing jeopardy in finding that the original jeopardy had never terminated. App. at 54. "Where neither double jeopardy nor the principle of collateral estoppel are applicable in preventing reprosecution, as is the case here, the parties are placed in the 'same position as if the cause had never been tried.' (*People* v. *Murphy* (1963) 59 Cal.2d 818, 833, citing to *Hall* v. *Superior Court* (1955) 45 Cal.2d 377, 381.)" App. at 55.

In its opinion, the Ninth Circuit disagreed with or ignored the state court rationale. The Ninth Circuit found collateral estoppel principles applicable, despite respondent's continuing jeopardy. The state and circuit courts are in conflict on the application of a fundamental constitutional principle. This conflict is intolerable to the administration of justice, for now criminal judgments in California may survive direct appeal only to founder in federal court.

The Ninth Circuit also is in conflict with federal circuit authority on the question whether collateral estoppel principles have application on retrial. See *United States* v. *Price*, 750 F.2d 363 (5th Cir. 1985). The Fifth Circuit explicitly held that collateral estoppel does not bar the introduction of evidence on retrial which directly supports the count to be retried, even though the same evidence was offered in the first trial in support of the counts of which the defendant was acquitted. *Id.* at 366.

In addition to the conflict between state law and other federal law on this issue, the Ninth Circuit's opinion highlights the confusion in the federal circuit courts over the application of collateral estoppel principles on retrial. Although this Court has never extended the principles announced in *Ashe* v. *Swenson* beyond the successive prosecution circumstances of that case, numerous federal circuit courts have done so. See, e.g., *United States* v. *Farmer*, 923 F.2d at 1563, n.12 (applying collateral estoppel on retrial, court did not reach question "whether the doctrine of collateral estoppel is limited, like its parent doctrine of double jeopardy, only to successive prosecutions"); *United States* v. *Dray*, 901 F.2d 1132 (1st Cir.), *cert. denied*, 111 S.Ct. 245 (1990) (collateral estoppel applied on retrial); *United States* v. *Citron*, 853 F.2d 1055 (2nd Cir. 1988) (retrial); *United States* v. *Crooks*, 804 F.2d 1441 (9th Cir. 1986) (retrial); *United States* v. *Head*, 697 F.2d 1200 (4th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (retrial); *United States* v. *DeVincent*, 632 F.2d 155 (1st Cir. 1980), *cert. denied*, 450 U.S. 984 (1981) (retrial); *United States* v. *Powell*, 632 F.2d 754 (9th Cir. 1980) (retrial). Compare *United States* v. *Richard*, 892 F.2d 761 (9th Cir. 1989) (collateral estoppel applied on successive prosecution); *United States* v. *Ricks*, 882 F.2d 885 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 846 (1990) (successive prosecution); *United States* v. *Kaytso*, 868 F.2d 1020 (9th Cir. 1988) (successive prosecution); *Ferenc* v. *Dugger*, 867 F.2d 1301 (11th Cir. 1989) (successive prosecution); *United States* v. *Martinez*, 785 F.2d 663 (9th Cir. 1986) (successive prosecution); *Flittie* v. *Solem*, 775 F.2d 933 (8th Cir. 1985)(en banc), *cert. denied*, 475 U.S. 1025 (1986)

(successive prosecution); *United States* v. *Mock*, 604 F.2d 336 (5th Cir. 1979) (successive prosecution).

A review of the federal cases shows that the collateral estoppel analysis, whether applied to cases involving retrial or successive prosecutions, is the same, with *Ashe* v. *Swenson* cited as the primary authority. With the exception of *United States* v. *Farmer*, 923 F.2d at 1563, n.12, none suggested that "the doctrine of collateral estoppel is limited, like its parent doctrine of double jeopardy, only to successive prosecutions." With the Ninth Circuit's appropriation of the broad *Grady* rule for purposes of collateral estoppel analysis, the issue whether collateral estoppel has any application on retrial is put into sharp focus. Both the state courts and the federal courts are in need of this Court's guidance on this issue of nationwide importance, which affects every criminal case, state or federal, in which retrial follows verdicts of both acquittal and guilt.

The Ninth Circuit has, in effect, turned the Double Jeopardy Clause into an exclusionary rule barring relevant evidence on retrial. Certiorari should be granted to restore to state and federal governments the ability to retry a defendant using all relevant evidence tending to show culpability in the crime of which he has already been convicted, regardless whether some or all of that evidence underlies a count or charge of which the defendant was acquitted.

CONCLUSION

For the foregoing reasons, we respectfully ask that the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit be granted.

Dated: May 6, 1992

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APPENDIX A

James PETTAWAY,
Petitioner-Appellant,

v.

Charles PLUMMER,
Sheriff of Alameda County,
Respondent-Appellee

No. 90-15469.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 11, 1991.

Decided August 23, 1991.

Defendant was convicted of murder in state court. The conviction was reversed due to error in an instruction. On remand defendant moved to preclude prosecution on theory that defendant had personally killed victim. The trial court dismissed complaint after prosecution indicated it could proceed only on that theory. After the state Appellate Court reversed and the state Supreme Court denied review, defendant brought habeas corpus proceeding. The United States District Court for the Northern District of California, Samuel Conti, J., denied petition and appeal was taken. The Court of Appeals, Beezer, Circuit Judge, held that jury's rejection of sentence enhancement based on theory that defendant had personally fired shot that killed victim, had collateral estoppel effect precluding on double jeopardy grounds retrial of defendant for actually perpetrating murder.

Reversed and remanded.

1. Double Jeopardy

Constitutional guaranty against double jeoparty includes concept of collateral estoppel. U.S.C.A. Const.Amend. 14.

2. Judgment

Collateral estoppel analysis, in connection with double jeopardy claim, involves: (1) identification of issues in two actions for purpose of determining whether issues are sufficiently similar and sufficiently material in both actions to justify invoking doctrine; (2) examination of record of prior case to decide whether issue was "litigated" in first case; and (3) examination of record of prior proceeding to ascertain whether issue was necessarily decided in first case. U.S.C.A. Const.Amend. 14.

3. Judgment

Rejection by jury of proposed murder sentence enhancement for actually perpetrating crime, meant that jury had "necessarily determined" that defendant was not actual perpetrator for purposes of establishing whether collateral estoppel prevented on double jeopardy grounds retrial of defendant as perpetrator. U.S.C.A. Const.Amend. 14.

4. Judgment

"Constitutional collateral estoppel" exists where fact necessarily determined in defendant's favor by earlier

acquittal makes conviction on challenged second trial impossible unless fact could be relitigated and determined adversely to defendant. U.S.C.A. Const.Amend. 5.

See publication Words and Phrases for other judicial construction and definitions.

5. Judgment

When enhancement of penalties for substantive offense is presented to trial jury for its determination beyond reasonable doubt, and jury expressly determines enhancement issue adversely to prosecution, prosecution cannot seek to prove contrary at second trial of substantive offense, where it is not clear that there was simply inconsistent verdict in first trial. U.S.C.A. Const.Amend. 5.

6. Judgment

Rejection of sentencing enhancement factor in murder case, which necessarily involved finding that defendant had not personally perpetrated killing, had collateral estoppel effect barring on double jeopardy grounds retrial of defendant based on theory that he had perpetrated the killing. U.S.C.A. Const.Amend. 14.

Renee E. Torres, First District Appellate Project, San Francisco, Cal., for petitioner-appellant.

Joan K. Haller, Deputy Atty. Gen., San Francisco, Cal., for respondent-appellee.

Appeal from the United States District Court for the Northern District of California

Before BEEZER, NOONAN, and FERNANDEZ, Circuit Judges.

BEEZER, Circuit Judge:

James Pettaway seeks a writ of habeas corpus on the ground that the State of California's attempt to retry him for murder on the theory that he was the actual perpetrator of the murder violates the Double Jeopardy Clause. In a prior state court criminal proceeding, a jury determined that he did not actually perpetuate [sic] the murder. The district court denied the petition. We reverse.

I

At Pettaway's first state court trial, it was established that on May 1, 1981, Pettaway, Lowana Walker and Michael Seals were at the house of Karen Taylor. At some point, Walker handed Pettaway a handgun with which he shot Seals in the back of the neck. Seals fainted, but when he regained consciousness he saw Pettaway and Walker leaving the house through the front door. Taylor was subsequently found dead in the bathroom with two bullet holes in her head. *People* v. *Pettaway*, 206 Cal.App.3d 1312, 254 Cal.Rptr. 436 (1988).

Pettaway was charged with and convicted of one count of murder and one count of attempted murder. The information included sentencing enhancement charges that, with respect to both the murder and the attempted murder, Pettaway personally used a firearm and personally inflicted great bodily injury.

The prosecution tried the case on the theory that Pettaway personally shot Seals and Taylor. Although the jury initially was not given a jury instruction on aiding and abetting, it requested and received such an instruction during the third day of deliberations.

With respect to the charges of personal use of a firearm and personal infliction of great bodily injury, the jury was instructed that if it found Pettaway guilty on either substantive charge, it had the "duty" to determine whether Pettaway personally shot the relevant victim and that it could do so only if the proof established beyond a reasonable doubt that he had done so. The jury was further instructed that "all twelve jurors must agree to the decision, and to any finding you have been instructed to include in your verdict." At the same time that the jury found Pettaway guilty of both substantive counts, it also found, in a special verdict, that Pettaway did not personally use the handgun or inflict great bodily injury in the commission of the murder of Taylor. The jury was polled and was found unanimously to agree with the verdict.

On appeal, the California Court of Appeal reversed the murder conviction because it found reversible error in the aiding and abetting instruction.

On remand, Pettaway moved to preclude the state from proceeding on the theory that Pettaway personally

shot Taylor. Pettaway argued that because the jury had found the sentence enhancements to be untrue with respect to the murder charge, the doctrines of double jeopardy and collateral estoppel barred the prosecution from advancing a theory that Pettaway shot Taylor. The trial court agreed, and because the prosecution said it could not proceed to trial solely on an aiding and abetting theory, the trial judge dismissed the murder count.

The California court of appeals reversed, *Pettaway*, 206 Cal.App.3d at 1315, 254 Cal.Rptr. 436, and the California Supreme Court denied review. Pettaway filed a petition for a writ of habeas corpus in federal district court, claiming that a retrial on the theory that he shot Taylor would violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution. The district court denied the petition and Pettaway appeals.

II

We review *de novo* the denial of a petition for writ of habeas corpus. *Carter v. McCarthy*, 806 F.2d 1373, 1375 (9th Cir. 1986), *cert. denied*, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987).

[1] The constitutional guarantee against double jeopardy includes the concept of collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469 (1970). The basis for Pettaway's petition is that his reprosecution on the theory that he shot Taylor is barred by this element of the Double Jeopardy Clause. To resolve this claim, we must first determine whether the jury's finding that Pettaway did not personally shoot Taylor has collateral estoppel effect. If it does, we must

determine whether the Double Jeopardy Clause bars Pettaway's reprosecution.

[2] Collateral estoppel analysis involves a three-step process:

> (1) An identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; (2) an examination of the record of the prior case to decide whether the issue was "litigated" in the first case; and (3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.

United States v. *Hernandez*, 572 F.2d 218, 220 (9th Cir. 1978).

[3] The state concedes that the question whether Pettaway fired the gun himself was actually litigated at the first trial. The prosecutor admitted that "at all times [his] theory of prosecution at [the original trial] and even now [at the retrial] would be that [Pettaway] shot and killed Karen Taylor." At argument, the state reiterated that it will not retry Pettaway if it is not permitted to claim that he fired the weapon.

The district court based its denial of Pettaway's petition on the third step of the collateral estoppel analysis, because the court believed the jury could have "'grounded its verdict on an issue other than that which the defendant seeks to foreclose from consideration.'"

Specifically, the court found that because California law makes the direct perpetrator of a crime and an aider and abettor equally guilty, *see People v. Beeman*, 35 Cal.3d 547, 554-55, 199 Cal.Rptr. 60, 674 P.2d 1318 (1984), "it is possible that the *verdict*, when considered as a whole, did not rely on the determination that [Pettaway] did not personally kill Ms. Taylor, but was grounded on a determination that [Pettaway] either personally shot Ms. Taylor or aided and abetted in her killing, without deciding between the two alternatives." (Emphasis in original.)

The district court's conclusion assumes that collateral estoppel does not apply unless the issue previously determined was necessary to the question of guilt or innocence. Discussion of the necessity prong of collateral estoppel analysis is usually framed in terms of determinations that were necessary to the "judgment" or the "verdict." *See, e.g., Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 n.2 (9th Cir. 1979) ("[R]elitigation of an issue . . . is not foreclosed if the decision of the issue was not necessary to the judgment reached in the prior litigation."); *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194 (court must determine whether jury could have grounded its "verdict" upon any other issue). However, the fact that the personal use determination at issue in the present case was not formally necessary for a finding of guilt on the murder charge does not prevent the finding from having collateral estoppel effect in this case.

The primary purpose of the rule that prior resolution of an issue will have collateral estoppel effect only if it was necessarily decided is to ensure that the finder of fact in the first case took sufficient care in

determining the issue. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4421, at 193 (1981).[1/] The Supreme Court has addressed this concern by focusing on the nature of the original proceedings. In *Burlington* [sic] v. *Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Court held that where the death penalty phase of a criminal proceeding bears the "hallmarks of a trial on guilt or innocence," *id.* at 439, 101 S.Ct. at 1858, failure of the state to obtain a death sentence indicates that there was insufficient evidence to support that sentence and retrial is barred. We have extended this holding to enhancement factors relevant to non-capital sentences, stating that an essential consideration is "whether the sentencing proceeding at issue resembled a trial on punishment." *Durosko* v. *Lewis*, 882 F.2d 357, 359 (9th Cir. 1989), *cert. denied*, __ U.S. __, 110 S.Ct. 1930, 109 L.Ed.2d 294 (1990). *Durosko* followed the approach of the Fifth Circuit, which held that where the state was required to prove the enhancement factors beyond a reasonable doubt, failure to do so prevents the state, via the Double Jeopardy Clause, from attempting to prove the same enhancement at a second trial. *Id.* at 359

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1. The other major concern is that appellate review of a determination may not be available where the issue is not necessary to the determination of the final judgment. Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4421, at 193 (1981). In California, the enhancement of a sentence pursuant to a finding of personal use of a firearm may be appealed. *See People* v. *Harty*, 173 Cal.App.3d 493, 219 Cal.Rptr. 85 (1st Dist. 1985).

(citing *Briggs* v. *Procunier*, 764 F.2d 368, 371 (5th Cir. 1985)).[2/]

In the present case, although the jury did not have to reach the question of personal use of the handgun if it did not find Pettaway guilty of murder, it was *required* to do so once it found him guilty. California law requires that the enhancement for personal use of a firearm be "pleaded and proven as provided by law." Cal.Pen.Code § 1170.1 (Supp.); *see also People* v. *Hernandez*, 46 Cal.3d 194, 249 Cal.Rptr. 850, 856, 757 P.2d 1013, 1020 (1988) (the enhancements in the California Penal Code are "part of a determinate sentencing system the inevitable pattern of which is to require additional terms to be imposed only after the enhancement has been found true by the trier of fact"); *People* v. *Najera*, 8 Cal.3d 504, 509-10, 105 Cal.Rptr. 345, 350, 503 P.2d 1353, 1358 (1972) (Because of the severity of the additional punishment compelled by section 12022.5, the enhancement for personal use of a firearm, a "properly instructed jury" "must make a specific finding on the issue of use."). The jury was instructed that it had the duty to determine whether the state had proven beyond a reasonable doubt that Pettaway fired the

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2. Where the original proceedings have all the characteristics of a trial on guilt or innocence, it does not matter whether the fact at issue was originally determined in the guilt/innocence phase, the sentencing phase, or, as here, as an enhancement factor tried during the guilt/innocence phase. *See, e.g., Delap* v. *Dugger*, 890 F.2d 285, 316 (11th Cir. 1989) (acquittal of felony murder in guilt/innocence phase prevents state from seeking death sentence on the ground that the killing occurred during the commission of a felony).

handgun.[3/] Thus, the issue of use was tried to the jury in a proceeding with all the "hallmarks of a trial on guilt or innocence," and was "necessarily determined" for the purposes of collateral estoppel.

The state also argues that the jury did not necessarily determine that Pettaway did not fire the handgun because that finding could be inconsistent with the guilty verdict.

The Supreme Court has stated that

> where truly inconsistent verdicts have been reached, "[t]he most that can be said is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." . . . It is equally possible that the jury, convinced of guilt, properly reached its

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3. California law requires that the enhancement be proved beyond a reasonable doubt, and that a unanimous jury determination is required. *See, e.g., People* v. *Allen*, 165 Cal.App.3d 616, 626, 211 Cal.Rptr. 837 (1985) (proof beyond a reasonable doubt); *People* v. *Frutos*, 158 Cal.App.3d 979, 988, 205 Cal.Rptr. 204 (1984) (unanimous verdict). We have no reason to doubt that the jury was so instructed in this case. Certainly, neither party makes any suggestion to the contrary.

That being so, there is no need to grant appellant's motion to augment the record with evidence that was not before the district court, and we decline to do so. *Cf. United States* v. *Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979); *see also Kirshner* v. *Uniden Corp.*, 842 F.2d 1074, 1077 (9th Cir. 1988). Those cases clearly apply to most appeals, and may or may not apply to habeas corpus appeals. *See Dickerson* v. *Alabama*, 667 F.2d 1364, 1366-68 (11th Cir.), *cert. denied*, 459 U.S. 878, 103 S.Ct. 173, 74 L.Ed.2d 142 (1982). However, we need not decide that issue in this case.

> conclusion on [one] offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

United States v. *Powell*, 469 U.S. 57, 64-65, 105 S.Ct. 471, 476, 83 L.Ed.2d 461 (1984) (quoting *Dunn* v. *United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932)). However, when there is only one *rational* conclusion to be drawn from the first jury's verdict, the Supreme Court has not allowed the possibility that the jury did not base the verdict on proper considerations to negate the collateral estoppel effects of the prior verdict. *See, e.g., Ashe*, 397 U.S. at 444 & n. 9, 90 S.Ct. at 1194-95 & n. 9 (the question is whether a *rational* jury could have based its decision on any other conclusion).

> Although in our concept of double jeopardy the law must recognize that a jury can act in an irrational manner--even to the point of ignoring the law or the Judge's instructions in a blend of undecipherable mercy--we must proceed on the basis that the jury in the first trial acted in a legally correct manner. Otherwise, the ultimate issue of fact decided by any jury could be second guessed and we could never apply the principle of collateral estoppel.

De La Rosa v. *Lynaugh*, 817 F.2d 259, 267-68 (5th Cir. 1987). The mere possibility that the jury acted irrationally, without more, will not negate the collateral

estoppel effects of a prior verdict if a rational interpretation of the verdict as a whole is possible.

This is not a case in which there is a "truly inconsistent verdict." To the contrary, there is a rational explanation that takes into account the whole of the jury's verdict. The jury was instructed that even if Pettaway did not personally use the weapon, he could be guilty of first degree murder as long as he aided and abetted the murderer. Therefore, the specific finding that he did not personally use a firearm was not inconsistent with the conviction; rather, it was as if the jury had issued a special verdict to that effect regarding the substantive offense.

Pursuant to California law, Pettaway's use of the handgun was pleaded and tried to the jury. The jury necessarily decided that Pettaway did not fire the fatal shots. For these reasons, we hold that this determination has collateral estoppel effect. We must next determine whether that effect may bar the prosecution from proceeding on the theory that Pettaway fired the handgun.

III

[4, 5] The Fifth Amendment guarantee against double jeopardy embodies the concept of collateral estoppel. *Ashe*, 397 U.S. at 445, 90 S.Ct. at 1195. In applying collateral estoppel as a component of the Double Jeopardy Clause, some courts have distinguished between legal and constitutional collateral estoppel, holding only the latter to implicate a constitutional right. *See, e.g., United States* v. *Head*, 697 F.2d 1200, 1205 (4th Cir. 1982); *United States* v. *Mock*, 604 F.2d 336, 338-40 (5th Cir. 1979). Constitutional collateral estoppel exists where "a fact necessarily determined in the defendant's favor by his

earlier acquittal [makes] his conviction on the challenged second trial . . . impossible unless the fact could be relitigated and determined adversely to the defendant." *Head*, 697 F.2d at 1205. On the other hand, "double jeopardy guarantees are not engaged by collateral estoppel which, if applied, would merely restrict proof but not make conviction impossible." *Id.*

"[T]he rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th Century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444, 90 S.Ct. at 1194. Consistent with this admonition, the Supreme Court has clarified that constitutional collateral estoppel depends on the actual circumstances of the second prosecution, rather than on some hypothetical application of the statute in question. For example, even if conduct for which a defendant was previously convicted is only one of several alternative kinds of conduct prohibited by the statute he is now charged with violating, the defendant has a substantial double jeopardy claim if the prosecution concedes that it will need to prove that conduct to convict the defendant. *Illinois* v. *Vitale*, 447 U.S. 410, 420, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980).

In *Grady* v. *Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), the defendant drove his automobile into another car, killing the driver and injuring the passenger. He pleaded guilty to driving while intoxicated and failing to keep right of the median. Two months later, the state brought homicide and criminal assault charges against the defendant for the death and injuries caused in the accident. The bill of particulars filed by the prosecution indicated that the prosecution

intended to rely on three acts to prove the charges: (1) driving while intoxicated, (2) failing to keep right of the median, and (3) driving at a speed too fast for the weather and road conditions.

The Supreme Court held that the Double Jeopardy Clause barred the prosecution, stating that

> the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. . . . The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. On the other hand, a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct. . . . This holding would not bar a subsequent prosecution on the homicide and assault charges if the bill of particulars revealed that the State would not rely on proving the conduct for which [the defendant] had already been convicted.

110 S.Ct. at 2093, 2094.

[6] The present case presents essentially the same situation. When Pettaway moved to prevent the State from proceeding on the theory that he shot Taylor himself, the prosecution admitted that it could not proceed on any other theory, because it could suggest no person Pettaway might have aided and abetted. The state trial court then prohibited the prosecution from proceeding on a theory based on conduct the state had previously failed to prove beyond a reasonable doubt.[4] The trial judge stated that he would not allow the prosecution to present to the jury the theory that "after he shot Michael Seals he then went and shot Karen Taylor."

The state trial court did not prohibit the introduction of evidence tending to show that Pettaway shot Taylor. The court's ruling did, however, make inadmissible evidence offered *only* to prove that Pettaway pulled the trigger. For example, the trial judge stated that he would not allow Lowana Walker to testify that she saw Pettaway shoot Taylor because "it is irrelevant because being offered to prove not that he aided and abetted her or anybody else, but that he actually did the killing."[5] The judge stated that he would allow the prosecution to

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4. Although the prior proceedings in *Vitale* and *Grady* resulted in convictions, an acquittal that has collateral estoppel effect has essentially the same double jeopardy ramifications as a conviction. *See North Carolina* v. *Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

5. Whether such a ruling would have been correct is not at issue in this appeal.

introduce evidence supporting *both* theories,[6] but explained that he would "instruct the jury that you cannot convict this man on any theory that he personally used the gun." Once this position was made clear, the prosecution admitted that it could present no evidence relevant to an aiding and abetting theory, and the trial judge dismissed the case. In other words, as in *Grady*, the trial court correctly barred reprosecution on a theory the prosecution had tried and failed to prove before.

If the state is allowed to proceed on the theory that Pettaway pulled the trigger himself, it is possible that the second jury would convict Pettaway by reaching a conclusion directly contrary to that reached by the jury in the first trial. This possibility is abhorrent to the principles underlying the Double Jeopardy Clause. *See Dowling* v. *United States*, 493 U.S. 342, 347-49, 110 S.Ct. 668, 671-72, 107 L.Ed.2d 708 (1990) ("A second prosecution [in *Ashe*] was impermissible because, to have convicted the defendant in the second trial, the second jury had had to have reached a . . . conclusion" directly contrary to that of the first jury. (Citing *Ashe*, 397 U.S. at 445, 90 S.Ct. at 1195.). Underlying the Double Jeopardy Clause is the idea, "deeply ingrained in at least the Anglo-American system of jurisprudence,"

> "that the State with all its resources and power should not be allowed to make

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6. The trial court indicated that it would allow the prosecution to present evidence relevant to an aiding and abetting theory, such as ballistic evidence regarding the gun used and the bullets found in Pettaway's possession.

> repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . ." *Green* v. *United States*, 355 U.S. 184, 187 [78 S.Ct. 221, 223, 2 L.Ed.2d 199] (1957). Multiple prosecutions also give the State an opportunity to rehearse its presentation of proof, thus increasing the risk of an erroneous conviction for one or more of the offenses charged. *See, e.g., Tibbs* v. *Florida*, 457 U.S. 31, 41 [102 C.Ct. 2211, 2217, 72 L.Ed.2d 652] (1982) (noting that the Double Jeopardy Clause "prevents the state from honing its trial strategies and perfecting its evidence through successive attempts at conviction").

Grady, 110 S.Ct. at 2091-92.

Allowing the state to reprosecute Pettaway for murder on the theory that he was the actual perpetrator of the murder permits the state to remedy the flaws it perceives as having been fatal to its case the first time, and to attempt to convince a second jury of that which it tried and failed to prove to the first jury. "Having received one fair opportunity to offer whatever proof it could assemble, the State is not entitled to another." *Bullington*, 451 U.S. at 446, 101 S.Ct. at 1862 (quotation omitted).

For these reasons, we hold that it would violate double jeopardy principles if, on retrial of the second offense, the prosecution attempted to prove that Pettaway did personally use the gun. We must, however, emphasize the limits of our holding. What we hold is that when enhancement of the penalties for a substantive offense is presented to the trial jury for its determination beyond a reasonable doubt, and the jury expressly determines the enhancement issue adversely to the prosecution, the prosecution cannot seek to prove the contrary at a second trial of the substantive offense, where it is not clear that there was simply an inconsistent verdict in the first trial. Of course, the prosecution could still seek to prove Pettaway guilty of first degree murder under an aiding and abetting theory, but, as we have pointed out, the prosecutor expressly eschews any intention to do so. Thus, because this prosecution must be based upon personal use of a firearm or nothing, we are constrained to hold that it cannot proceed at all.

IV

The district court's order is REVERSED and the cause is REMANDED with instructions to issue the writ of habeas corpus with respect to Pettaway's reprosecution for murder.